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Supreme Court, U.S.
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No. 03-1585

In the

Supreme Court of the United States

FRANCINE M. BOXER, MARSHALL FARNELL and SPOKANE COUNTY,
Petitioners,

v.

CLAUDE COX and LINDA COX,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Cox opposes the Petition for Certiorari for a single reason—he claims that there is not a circuit split on the first question presented to the Court. (Br. in Opp'n at 6.) Cox's position is untenable.

In *Bishop v. Wood*, the Court held that a terminated employee's liberty is not implicated unless the reasons for the discharge are publicly disclosed. 426 U.S. 341, 348 (1976). Here, the Ninth Circuit explicitly held that a document in an employee's personnel file is "publicly disclosed" if the document is one that is *subject* to disclosure under state law. *Cox v. Roskelley*, 359 F.3d 1105, 1112 (9th Cir. 2004).

In so holding, the Ninth Circuit squarely aligned itself with those circuit courts of appeals that hold *Bishop*'s "public disclosure" requirement satisfied by the mere existence of stigmatizing information in an employee's personnel file, so long as there is a *likelihood* or *possibility* that the information may be disseminated. The Ninth Circuit's holding is thus at loggerheads with those circuit courts of appeals that reject the likelihood of future dissemination standard, holding instead that *Bishop*'s public disclosure requirement is satisfied only when the information in the personnel file is *actually* disseminated to others.

As it did in *Codd v. Velger*, 429 U.S. 624 (1977), the Court should grant certiorari to resolve the issue.[1]

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[1] In *Codd*, the Court did not reach the issue of whether making a personnel file containing stigmatizing information available to prospective employers satisfies *Bishop's* public disclosure requirement, one of two issues for which it had granted certiorari. The Court concluded that the plaintiff's liberty-interest claim was fatally

REASONS FOR GRANTING THE PETITION

The Court Should Resolve the Deep and Persistent Split and Determine Whether a Mere Likelihood or Possibility of Future Dissemination Satisfies *Bishop*'s "Public Disclosure" Requirement, or Whether Actual Dissemination Is Needed.

The rule of law underlying the first question presented is, on its face, straightforward. A terminated employee's liberty is not implicated "when there is no public disclosure of the reasons for the discharge." *Bishop*, 426 U.S. at 348; *see also Codd*, 429 U.S. at 628 (recognizing that due process is required "[o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination") (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Bishop*, *supra*)).

As is evident, however, from the numerous conflicting court of appeals opinions interpreting *Bishop*, determining what constitutes "public disclosure" has proven elusive. In the nearly thirty years since *Bishop* was decided, the circuit courts of appeals have "reached diametrically different conclusions." *Cox*, 359 F.3d at 1115 n.2 (Hall, J., dissenting); *see also Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997) (Posner, J.) (recognizing and describing split); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998) (recognizing split); *Llamas v. Butte Cmty. Coll. Dist.*, 238 F.3d 1123, 1129-30 (9th Cir. 2001) (same); *Swinton v. Safir*, 697 N.Y.S.2d 869, 872-73, 720 N.E.2d 89, 92-93 (N.Y. 1999) (recognizing and describing federal circuit split).

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flawed because falsity had been neither alleged nor proven. *Id.* at 626-27.

At one end of the continuum are those courts that require *actual* dissemination of the allegedly false and stigmatizing information. *See Olivieri*, 122 F.3d at 408 (collecting cases). In such jurisdictions, the public disclosure requirement of a liberty-interest claim is not satisfied merely because an employee's personnel file contains allegedly defamatory information, even if it is very likely that the information will ultimately be disseminated to others.

For example, in *Johnson v. Martin*, a probationary police officer was terminated after a random drug test proved positive. 943 F.2d 15, 16 (7th Cir. 1991). The terminated officer's personnel file contained the positive drug-test result, and the employee brought suit. *Id.* The Seventh Circuit flatly rejected the employee's claim that his liberty interest was implicated by the mere presence of the test result in his personnel file, notwithstanding that it was highly likely that the result would ultimately be disseminated to others. *Id.* at 17. The court held that until such time as the information in the personnel file was in fact disseminated to the public, the employee's liberty interest was not implicated. *Id.* at 16-17.

Similarly, in *Ortega-Rosario v. Alvarado-Ortiz*, a document implicating an employee in a theft was placed in the employee's personnel file. 917 F.2d 71, 72 (1st Cir. 1990). Thereafter, the employee was terminated, and he filed suit alleging, among other things, that he had been deprived of liberty without due process. *Id.* The First Circuit upheld the district court's dismissal of plaintiff's liberty-interest claim, holding that the mere presence of the stigmatizing document in the employee's file did not constitute dissemination for purposes of a liberty-interest claim because the document had not been otherwise disclosed. *Id.* at 74-75.

Likewise, in a case remarkably similar to the present one, an allegedly stigmatizing termination letter was copied to an employee's personnel file pursuant to a "carbon copy" annotation on the letter. In resolving the employee's liberty-interest claim, the Third Circuit affirmed summary judgment for the employer, because the employee had shown, at most, that a copy of the letter was placed in his file and "ha[d] not offered any evidence of actual dissemination." *Cooley v. Pa. Hous. Fin. Agency*, 830 F.2d 469, 474 (3d Cir. 1987).

At the other end of the continuum, and in marked contrast to the aforementioned cases, are those jurisdictions holding that actual dissemination is *not* required to satisfy *Bishop*'s public disclosure requirement and that the mere presence of stigmatizing information in a public employee's personnel file is sufficient if there is a possibility or likelihood that the information in the file will be disseminated to others.[2] *See Olivieri*, 122 F.3d at 408 (collecting cases).

For example, the Fourth Circuit does not require actual dissemination. It instead holds the public disclosure requirement satisfied if the allegedly stigmatizing contents of an employee's personnel file "may be the subject of inspection by prospective employers." *Ledford v. Delancey*, 612 F.2d 883, 886 (4th Cir. 1980). The Eleventh Circuit likewise does not require actual dissemination, but instead holds that placing a document in a public employee's

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[2] A handful of other courts "have hedged" on the issue. *See Olivieri*, 122 F.3d at 408 (Posner, J.) (describing cases). For example, after discussing the split in the federal circuits, the New York Court of Appeals held that proof of actual dissemination of the information in the personnel file is required if the plaintiff seeks compensatory-type damages, but that proof of only a likelihood of dissemination is required if a plaintiff seeks only expungement of the document. *Swinton*, 697 N.Y.S.2d at 872-73, 720 N.E.2d at 92-93.

personnel file is "sufficient publication" for a liberty interest claim, if the file is available for review upon request pursuant to state law. *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1046 (11th Cir. 1989). Similarly, the Second Circuit does not require actual dissemination, holding instead that the public disclosure element "is satisfied where the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 631-32 (2d Cir. 1996) (internal quotation marks and citation omitted).

Numerous courts, both federal and state, have expressly recognized this split in authority among the federal circuit courts. *See, e.g., Olivieri*, 122 F.3d at 408; *Swinton*, 697 N.Y.S.2d at 872-73, 720 N.E.2d at 92-93. Prior to ruling in the instant case, the Ninth Circuit had expressly recognized, but avoided, this circuit split on two occasions.

In the first case, *Mustafa v. Clark County School District*, the plaintiff appealed, *inter alia,* the district court's ruling that charges of sexual misconduct included in a teacher's personnel file, which was available for prospective employers to review, had not been "publicized" for purposes of a liberty-interest claim. 157 F.3d 1169, 1179 (9th Cir. 1998). Although the Ninth Circuit commented in dicta that this ruling "may be problematical," the court never reached the issue because it held the employee's liberty-interest claim deficient for other reasons. *Id.* Nonetheless, *Mustafa* expressly recognized that the circuits were split on the issue of whether actual dissemination by the employer is required to satisfy the publication element of a liberty-interest claim, and it recognized that the Ninth Circuit had not yet decided the issue. *Id.* at 1179 n.10.

In *Llamas v. Butte Community College District,* the Ninth Circuit again faced the question of whether placing derogatory information in an employee's personnel file constitutes the public disclosure required by *Bishop*. 238 F.3d 1123, 1129-30 (9th Cir. 2001). The court again acknowledged the split in the circuits and that it had not yet decided the issue. *Id.* at 1130 (citing *Olivieri,* 122 F.3d at 408, and cases cited therein). As in *Mustafa*, however, the court avoided resolving the issue, holding instead that the liberty-interest claim failed because the employee's file had been purged. Thus, the court explained:

> We do not need to address the current circuit split as to whether an employer can satisfy the publication prong [of a liberty-interest claim] by maintaining stigmatizing information in its personnel files.

Id. Notwithstanding, *Llamas* held the individual defendants entitled to qualified immunity because "[i]t is not well established, and the unlawfulness would not be apparent to a reasonable community college official, that filing derogatory material . . . constituted a violation of [plaintiff's] constitutional rights." *Id.* at 1131.

The issue of whether an employer "publicly discloses" a document by placing it in an employee's personnel file was once again squarely before the Ninth Circuit in the instant case. The court initially avoided the issue by summarily affirming the district court's decision in a six-sentence unpublished opinion that did not even acknowledge, much less address, the circuit split. (App. 84-86.)

Only on motion for reconsideration of its unpublished opinion did the Ninth Circuit finally decide the issue that it had repeatedly avoided: whether actual dissemination by an employer to others is required to satisfy *Bishop*'s public disclosure requirement, or whether a likelihood or

possibility of future dissemination instead suffices. The panel majority joined the ranks of those courts that do *not* require actual dissemination:

> We now hold explicitly that placement of the stigmatizing information in Cox's personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient [for purposes of a liberty-interest claim].

Cox, 359 F.3d at 1112. In other words, the majority held that because Cox's termination letter was subject to disclosure upon request, the letter was "publicly disclosed" for purposes of due process when it was placed in his personnel file—regardless of whether a request was ever made. Thus, the court necessarily rejected an *actual* dissemination standard.

The panel majority characterized its decision as a logical extension of its prior reasoning in *Mustafa* and *Llamas,* and an adoption of the analysis used by the Eleventh Circuit in *Buxton*. Inexplicably, however, the majority did not even acknowledge the circuit split recognized in *Mustafa* and *Llamas*, even though it discussed both cases in great detail. The panel also failed to address the decisions of its sister circuits that were contrary to its holding, as well as Judge Hall's forceful dissent. *Id.* at 1115 n.2 (Hall, J., dissenting).

Notwithstanding the panel majority's silence, there can be no serious dispute that its holding—that a document subject to disclosure under state law is "publicly disclosed" when it is placed in an employee's personnel file—directly conflicts with those circuits that require that the stigmatizing information in the personnel file be *actually disseminated* to others. *See, e.g., Johnson,* 943 F.2d at 17 (explicitly rejecting the Second Circuit's standard that a

likelihood of dissemination suffices; "Defining 'public disclosure' in a way which encompasses 'no public disclosure' is an exercise we choose not to embrace."). Conversely, the panel's holding is entirely consistent with those circuits that hold that *Bishop*'s public disclosure requirement is satisfied if there is a likelihood or possibility that the stigmatizing information in an employee's personnel file may be disclosed to others. For these reasons, Cox's contention that the Ninth Circuit's holding does not implicate the circuit split discussed herein—and in *Mustafa, Llamas*, *Olivieri,* and *Swinton*, among others—is, at best, disingenuous. *See Cox*, 359 F.3d at 1113 (Hall, J., dissenting) (explaining that the panel majority "cho[se] sides on an issue upon which other circuits have manifestly disagreed, and [the Ninth Circuit has] explicitly refrained from addressing").

Likewise, Cox's contention that Washington's public records act distinguishes this case from all cases save *Buxton* is misguided. Every state in the nation has a public records act that provides for the disclosure, upon request, of non-exempt public records.[3] In holding *Bishop's* public

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[3] *See* ALA. CODE § 36-12-40 (2002); ALASKA STAT. § 40.25.110 (Michie 2002); ARIZ. REV. STAT. § 39-121.01 (2002); ARK. CODE ANN. § 25-19-105 (Michie 2002); CAL GOV'T CODE § 6252 (West 2002); COLO. REV. STAT. § 24- 72-303 (2002); CONN. GEN. STAT. § 1-200 (2002); DEL. CODE ANN. tit. 29, § 10002 (2002); D.C. CODE ANN. § 2-502 (2002); FLA. STAT. § 119.01 (West 2003); GA. CODE ANN. § 50-18-70 (2002); HAW. REV. STAT. § 92F-3 (2002); IDAHO CODE § 9-337 (Michie 2002); 5 ILL. COMP. STAT. § 140/2 (2002); IND. CODE § 5-14-3-2 (2002); IOWA CODE § 22.1 (2002); KAN. STAT. ANN. § 45-217 (2002); KY. REV. STAT. ANN. § 61.870 (Michie 2002); LA. REV. STAT. ANN. § 44:1 (West 2002); ME. REV. STAT. ANN. tit 1, § 402 (West 2002); MD. CODE ANN., STATE GOV'T § 10-611 (2002); MASS. GEN. LAWS ch. 66, § 1 (2002); MICH. COMP. LAWS § 15.232 (2002); MINN. STAT. § 13.01 (2002); MISS. CODE ANN. § 25-61-3 (2002); MO. REV. STAT. § 109.210 (2002); MONT. CODE ANN. § 2-6-101 (2002); NEB. REV. STAT. § 84-712 (2002); NEV. REV. STAT. § 239.010 (2002); N.H. REV. STAT. ANN. § 91-

disclosure requirement satisfied, the Ninth and Eleventh Circuits relied on the fact that these acts "mandat[e] release upon request," *Cox*, 359 F.3d at 1112, making it possible that a document "may be reviewed years after it is filed," *Buxton*, 871 F.2d at 1045. The Ninth and Eleventh Circuits are thus no different than those jurisdictions, such as the Second and Fourth Circuits, that hold the public disclosure requirement satisfied if there is a *possibility* or *likelihood* that a document in a personnel file will be disseminated—that the document falls within the purview of a state's public records act simply establishes the requisite possibility or likelihood.[4] This approach stands in clear contravention of the approach followed by the First, Third, and Seventh Circuits, where *actual* dissemination is

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A:1 (2002); N.J. STAT. ANN. § 47:1A-1 (West 2002); N.M. STAT. ANN. § 14-3-2 (Michie 2002); N.Y. PUB. OFF. LAW § 87 (McKinney 2002); N.C. GEN. STAT. § 132-1 (2002); N.D. CENT. CODE § 44-04-18 (2002); OHIO REV. CODE ANN. § 149.43 (West 2002); OKLA. STAT. tit. 51, § 24A.3 (2002); OR. REV. STAT. § 192.001 (2002); PA. STAT. ANN. tit. 65, § 66.1 (West 2002); 32 P.R. LAWS ANN. § 1781 (2002); R.I. GEN. LAWS § 38-2-2 (2002); S.C. CODE ANN. § 30- 4-20 (Law. Co-op. 2002); S.D. CODIFIED LAWS § 1-27-21 (Michie 2002); TENN. CODE ANN. § 10-7-503 (2002); TEX. GOV'T. CODE. ANN. 552.022 (Vernon 2002); UTAH CODE ANN. § 63-2-201 (2002); VT. STAT. ANN. tit. 1, § 317 (2002); VA. CODE ANN. § 2.2-3701 (Michie 2002); 3 V.I. CODE ANN. § 881 (2002); WASH. REV. CODE § 42.17.250 (2002); W. VA. CODE § 29B-1-1 (2002); WIS. STAT. § 19.35(1) (2002); WYO. STAT. ANN. § 16-4-201 (Michie 2002).

[4] Indeed, the documents at issue in *Llamas* clearly were public records under California's public disclosure act, which is substantively nearly identical to Washington's. *See generally and compare* WASH. REV. CODE § 42.17.270 *with* CAL. GOV. CODE § 6253 (requiring release of public records upon request); *compare* WASH. REV. CODE § 42.17.020(36) *with* CAL. GOV. CODE § 6252(e) (defining public records similarly); *compare* WASH. REV. CODE § 42.17.290 *with* CAL. GOV. CODE § 6200 (prohibiting public records from being destroyed to prevent disclosure); *compare* WASH. REV. CODE § 42.17.255 & .310 *with* CAL. GOV. CODE § 6254 (establishing similar limited privacy exemptions).

required.[5] *See, e.g., Johnson*, 943 F.2d at 17; *Ortega-Rosario*, 917 F.2d at 74-75; *Cooley*; 830 F.2d at 474-75; *see also Cox*, 359 F.3d at 1115 n.2. (Hall, J., dissenting) (recognizing that panel majority's opinion contravenes those of other circuits).

The Court should grant certiorari to resolve this split and to determine whether proof of actual dissemination is needed to satisfy *Bishop*'s public disclosure requirement.

CONCLUSION

For the reasons herein and in the Petition for Writ of Certiorari, Petitioners respectfully request that certiorari be granted.

RESPECTFULLY SUBMITTED this 20th day of August, 2004.

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[5] Significantly, case law concerning Washington's public records act does not support Cox's position. It supports the position of the First, Third, and Seventh Circuits—that there is no "public disclosure" unless and until a document is actually disseminated. *See Bonamy v. City of Seattle*, 92 Wash. App. 403, 409, 960 P.2d 447, 450-51 (1998) ("[P]ublic disclosure is not necessary until and unless there has been a specific request for records.... A public agency cannot be expected to disclose records that have not yet been requested.").